MEMORANDUM OF LAW

DATE: May 8, 1996

TO: Ashley Walker, Executive Director, Human Relations Commission

FROM: City Attorney

SUBJECT: California Civil Rights Initiative

QUESTION PRESENTED

The Human Relations Commission ("HRC") has asked what effect, if any, the passage of the California Civil Rights Initiative ("CCRI") will have on the following programs, contracts or employer/employee relations:

1. Equal Opportunity Contracting Program ("EOCP").

2. Contractual relationships with the federal government.

3. Employment/promotions.

4. Scope of current programs.

SHORT ANSWER

The CCRI proposes an amendment to the California Constitution. It prohibits discrimination or preferential treatment by the state. "State" is very broadly defined for purposes of this constitutional amendment and includes virtually all public entities. However, although the proposed amendment is very broad, it will have a limited impact on City of San Diego ("City") programs because of the way City programs are structured.

BACKGROUND

The CCRI is an initiative that has qualified for placement on the state ballot in November. It is a constitutional amendment which purports to prohibit the use of race, sex, color, ethnicity or national origin as a criterion for either discriminating against, or granting preferential treatment to, individuals or groups whenever public monies are the funding source. This includes education and contracting.

Because the initiative has not become law, the usual aids to constitutional interpretation, such as ballot arguments and prior judicial construction, are not available to us. Nevertheless, certain general principles of law and constitutional interpretation may be useful in projecting the possible implications of the CCRI on City programs.

ANALYSIS

The safest and most reliable method of attempting to project the possible effects of the CCRI on City programs is to interpret the proposed constitutional amendment working under the same constraints that bind a judge when the judge is interpreting a constitutional provision. Courts have said that with regard to interpreting a law or constitutional amendment:

> We begin with the fundamental rule that our primary task is to determine the lawmakers' intent . . . . In the case of a constitutional provision adopted by the voters, their intent governs . . . . To determine intent, '"The court turns first to the words themselves for the answer."' "If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters)" . . . .
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> . . . Words used in a constitutional provision "should be given the meaning they bear in ordinary use" . . . . Significance should be given, if possible, to every word of an act . . . . Conversely, a construction that renders a word surplusage should be avoided . . . .

Delaney v. Superior Court, 50 Cal. 3d 785, 798 (1990) (citations omitted).

With these rules as guidance, we look at the language of the proposed CCRI. It provides in pertinent part: "The State shall not discriminate against or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting."

1. Equal Opportunity Contracting Program

The language of the proposed amendment is extremely broad and appears to affect almost every aspect of the City's EOCP. However,

because the City's Minority Business Enterprise/Women Business Enterprise/Disadvantaged Business Enterprise ("MBE/WBE/DBE") program is currently voluntary only, because of a court order enjoining our previous program, the impact should be minimal. The current program provides for the inclusion of minimum participation levels of MBE/WBE/DBE firms in bids by prime contractors. The suggested level of participation is fifteen (15) and twenty (20) percent for construction contracts. However, no penalties or enhancements exist to encourage or discourage this voluntary participation level, and contracts may be neither awarded nor denied on the basis of a firm's voluntary participation.

In 1995 the City adopted an ordinance mandating that contractors with the City comply with existing state and federal discrimination laws. San Diego Municipal Code ("SDMC") sections 22.2701 through 22.2708. By its plain language the purpose of the ordinance is to ensure compliance with existing state and federal laws. It does not impose new or additional requirements. While the CCRI will affect state programs, by its own language it will have no effect on federal programs. Thus, to the extent that the ordinance monitors compliance with federal law, it will not be affected. Even the interaction between state and city programs should remain unchanged because, as previously noted, our current program neither requires nor rewards preferences.

The mere fact that current City EOC programs are voluntary or do not impose requirements other than those found in existing laws does not guarantee the City programs will remain unchallenged if the CCRI becomes law. However, City programs should withstand legal challenges under the auspices of the CCRI because of the structure and requirements of the program do not conflict with the CCRI.

2. Contractual Relationships with the Federal Government

The CCRI provides in Section(e): "Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state." Contractual relationships with the federal government involve federal funding through grants, contracts, or other mechanisms. Thus, to the extent

requirements such as federal fair share are necessary to procure federal funding, the CCRI will have no impact. (A copy of statistical information regarding funding levels is attached.) To the extent such requirements are imposed by the City they will be invalid under the CCRI.

3. Employment/Promotions

The San Diego City Charter specifically addresses the issue of discrimination or preference in the City's hiring and promotional process. Charter section 120 provides in pertinent part: "No question in any test shall relate to race, or to political or religious opinions, affiliations or service, and no appointment, transfer, layoff promotion, reduction suspension or removal shall be affected or influenced by race or such opinions" ┌emphasis addedσ. The charter language thus comports with the language of the CCRI in terms of its hiring and retention process with regard to race and ethnicity.

Additionally, Council Policy 300-10 adopted in 1986 sets forth the City's commitment to equal opportunity in hiring, promotions and public contracting. Here too, the commitment is to provide access and to achieve a balance that reflects the City's diversity. The council policy specifically includes gender within its equal opportunity parameters. There are, again, no rewards or penalties that are tied to this council policy. There should, therefore, be no conflict with the CCRI.

Gender classifications have long been deemed worthy of scrutiny by both statutes and case law. Currently, gender-related classifications and distinctions are subject to an intermediate level of judicial scrutiny when challenged. However, the CCRI by its own terms specifically weakens the prohibitions against some forms of gender discrimination. The Supreme Court has said that "the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an exceedingly persuasive justification for the classification." Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982). The CCRI would lower the standard of review used by the Courts from an intermediate scrutiny to a reasonableness test. Conceptually, women could, under this lower standard, be excluded from City jobs they may currently pursue. For example, women could be excluded from being firefighters because of

inadequate or insufficient sleeping or rest room facilities. Such a reason could satisfy the reasonable basis test but falls far short of the intermediate scrutiny standard. While the City does not propose to alter its current employment standards for women, the CCRI opens the door for such changes to be made and such changes have the potential for reversing current practices.

4. Scope of Current Programs

Finally, you have asked what impact the CCRI will have on other City programs. The City programs that would most reasonably fit within the penumbra of the CCRI are the Diversity Commitment and the Equal Employment Investigative Office ("EEIO") functions. Neither of these programs should be affected by the CCRI. The Diversity Commitment seeks, through education, communication and participation, to encourage all City employees to treat other City employees, City customers and all people with respect and dignity. It has no implications that involve discrimination or preferences within the City.

The EEIO program investigates complaints of discrimination by City employees. Here, too, the CCRI should have no impact because the complaints brought to the EEIO for investigation are based on violations of existing law, and contrary to the dictates of the CCRI, actually involve allegations of acts of discrimina- tion made on the basis of a prohibited classification. Such acts, if found to be discriminatory, would violate the CCRI as well as existing law because it too prohibits discriminatory acts.

CONCLUSION

The parameters of the CCRI are extremely broad and would appear to affect all City programs. However, that impact will be minimal because City contracting programs are voluntary and its employment programs do not, by law, permit either discrimination or favoritism.

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By
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